IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 08.09.2006

Coram:

The Honourable Mr. Justice V. DHANAPALAN

W.P. No.12254 of 2006
&
W.P.M.P. No.13824 of 2006

Bapalal & Co. Exports
64, Thirumalai Pillai Road
T. Nagar
Chennai - 600 017 .. Petitioner

vs.

The Joint Commissioner of Income Tax (OSD)
Circle - I
Room No.309, III Floor, New Block
121, M.G. Road
Nungambakkam
Chennai - 600 034 .. Respondent

Writ Petition filed under Article 226 of the Constitution of India praying for a writ of certiorari as stated therein.

For petitioner Mr.Patty S.Jagannathan
For respondent Mr.M.Muralikumaran

ORDER

By consent of the learned counsel on either side, the writ petition itself is taken up for final disposal.

2. The prayer in the writ petition is for issuance of a writ of certiorari calling for the assessment order dated 31.03.2006 passed by the respondent for the assessment year 2000-2001 in PA/GI/No.21340-B/AACFB1608H and quash the same.

3. The case of the petitioner in nutshell is as follows:

a. The petitioner is a firm reconstituted on 21.06.1999 and it has been carrying on business in plain and studded gold and silver jewellery and articles in general and such other businesses as the partners deem fit. It is an Income Tax assessee and has been paying Income Tax to the respondent Department regularly.

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b. During the assessment year 2000-2001, it had conveyed one of its properties in Mumbai for a sum of Rs.2,47,50,000/- in exchange of another property in Mumbai for a sum of Rs.92,40,000/-. The total cost of transaction along with the cost of registration was Rs.1,00,41,925/-. Thereafter, the petitioner had purchased a flat in Chennai in the month of March 2000 for a sum of Rs.30 lakhs. Based on the above transaction, the firm had filed its return of income on 13.11.2000 declaring a business loss of Rs.3,60,412/- and short-term capital gains of Rs.1,16,51,612/-. Thus, the total income that was declared was Rs.1,12,91,200/- and accordingly, the petitioner paid Income Tax of Rs.46,68,528/-.

c. The Income Tax assessment as per Section 143(1) of the Income Tax Act ("the Act") was completed on 04.01.2002 and an intimation dated 04.01.2002, ordering a refund of Rs.1,45,563/- was received by the petitioner on 18.02.2004. In the said intimation sent by the respondent, there were certain mistakes and hence, the petitioner firm filed a petition under Section 154 of the Act for rectification of the same.

d. This being the position, on 19.03.2005, the petitioner firm received a notice dated 18.03.2005 under Section 148 of the Act, i.e. nearly after three years of the final assessment. According to the petitioner firm, this notice is issued without assigning any reason and it is in violation of mandatory provision under Section 148 (2) of the Act. Thereafter, the petitioner firm requested the original return filed on 13.11.2000 to submit a detailed objection with regard to the re-opening of the assessment. Subsequently, the respondent Department issued another notice under Section 143(2) of the Act calling upon the petitioner firm to submit various other details and for a hearing on 23.08.2005. Accordingly, the petitioner firm has furnished its reply.

e. In the said second notice dated 07.03.2006, the respondent Department had also sought for certain details to be furnished on or before 16.03.2006 and this notice was received by the petitioner firm only on 16.03.2006 and hence, the petitioner firm, on 17.03.2006, sought for time to submit the details. In reply, the respondent had granted

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time vide her letter dated 20.03.2006 till 27.03.2006. In the same letter, it was also stated that the respondent had proposed to re-work the capital gains on sale of old flat at Mumbai by treating flat at Chennai and new flat at Mumbai as "non-business assets" and the petitioner was asked to submit its objection, if any, for the same. The petitioner was not given sufficient opportunity to place the correct facts to the respondent and from the reasons given by the respondent, it is apparent that (i) the re-opening is not based on any fresh material found out by the respondent, (ii) the re-opening of assessment is without jurisdiction as the facts now disputed were all part of the records while filing the income tax returns.

f. On 10.02.2004, the petitioner submitted a rectification petition to rectify that the flat in Mumbai was exchanged in the month of February and hence, Interest under Section 234C can be levied for one month and cannot be charged as found in the intimation order. While the rectification petition was pending, the petitioner received a notice dated 18.03.2005 under Section 148 of the Act and was requested to produce the original return filed on 13.11.2000 as reply, which, according to the petitioner firm, was issued without assigning any reason.

g. With regard to notice under Section 143(2) of the Act, the petitioner furnished all the details. In this situation, the petitioner had repeatedly requested the respondent to furnish the reasons for re-opening the assessment. The respondent, as an after-thought, furnished irrelevant reasons in his letter which were not disclosed in the notice issued under Section 148 and hence, the impugned assessment order dated 31.03.2006 is in total violation of the principles laid down in this regard and the same is challenged in this writ petition.

4. The main grounds of challenge in this writ petition are that (i) under the Act, the opinion given in an assessment cannot be reopened by any other authority except on fresh materials, (ii) it is settled law that along with notice issued under Section 148, reasons should be given or annexed along with notice itself and therefore, the entire proceedings is vitiated, (iii) the impugned assessment order issued without giving any opportunity to the petitioner and without verifying any

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fresh materials is liable to be quashed, (iv) in the absence of any new material, the assessing officer is not empowered to re-open an assessment irrespective of the fact whether it is made under Section 143(1) or 143(3) of the Act, (v) the impugned order passed by the respondent deliberately without issuing any notice in changing the status of the assessee from a "firm" to a "body of individuals" who are not before the respondent, is illegal, (vi) the respondent has not verified any evidence to satisfy that the flats in Chennai and Mumbai are not used for business and on these grounds, the impugned order is liable to be quashed and the petitioner need not pursue the appeal against the order and is entitled to approach this Court invoking jurisdiction under Article 226 of the Constitution of India.

5. Mr.Patty S.Jagannathan, learned counsel for the petitioner, in his submissions, has strenuously contended that:

a. the notice dated 18.03.2005 issued by the respondent under Section 148 of the Act, nearly after three years of assessment and that too, without disclosing any reason, is in violation of mandatory provision under Section 148 (2) of the Act and also the law laid down by the Supreme Court in JT 2000 (9) SC 567 in the case of Comunidado of Chicalim v. Income Tax Officer, Goa & Others and the impugned order challenged in the writ petition has been issued with malafide intention to prevent the petitioner from filing objection and the respondent has escaped from passing a speaking order;

b. as per the mandatory provision laid down under Section 153(2) of the Act, the notice issued under Section 148 of the Act, issued after three years of the assessment order, is illegal;

c. another notice under Section 143(2) of the Act issued on 08.08.2005 without assigning any reason in violation of the proviso of Section 143(2) of the Act is also illegal and without jurisdiction;

d. the respondent, before passing the impugned order, is bound to pass a speaking order on the objections and therefore, the impugned order is unsustainable;

e. the petitioner is a "firm" re-constituted on 21.06.1999 but the respondent has passed the impugned order as a "body of individuals" without any notice to the petitioner of changing its status and therefore, it is in violation of the settled legal position and

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f. under Sections 246(A) and 251 of the Act, the respondent cannot decide the legal issues in the appeal and therefore, the petitioner has no other option but to challenge the impugned proceedings before this Court as per the law laid down by the Supreme Court.

6. In support his above contentions, the learned counsel for the petitioner has relied on various decisions of the Supreme Court, namely, the decisions reported in (a) 1997 ITR SC (Volume 225) 447 in the case of Andhra Bank Ltd. V. Commissioner of Income Tax (SC), (b) (2003) 259 ITR 19 in the case of GKN Driveshafts (India) Ltd. V. Income Tax Officer and Others (SC) and (c) (1999) 3 SCC 30 in the case of Ram Bai v. Commissioner of Income Tax (paras 6 and 7).

7. While admitting the writ petition on 27.04.2006, this Court had ordered notice to the respondent and granted an order of interim stay.

8. Mr.M.Muralikumaran, learned counsel for the respondent, on instruction from the respondent, has contended that the impugned order issued by the respondent is legally valid as the petitioner has not furnished the particulars such as (i) the nature of business conducted during the year at Mumbai (ii) details for liabilities for "Other Finance", names and addresses of parties and confirmation from the parties (iii) confirmation from retired partner for amount due to him (iv) debit entries in the partners' current accounts regarding Bharat Diamond Bourse, distribution of stocks and goodwill written off, (v) nature of service rendered by parties at Mumbai for whom salary was paid, etc. and in view of the above, the writ petition is liable to be dismissed.

9. Before proceeding to consider whether the impugned order is sustainable or not, it would be proper for this Court to refer to certain Sections of the Income Tax Act and they are as under:

Assessment - Section 143(1)

Where a return has been made under Section 139, or in response to a notice under sub-section(1) of Section 142, --

(i) if any tax or interest is found due on the basis of such return, after adjustment of any tax deducted at source, any advance tax paid, any tax paid on self-assessment and any amount paid otherwise by way of tax or interest, then, without prejudice to the provisions of sub-section (2), an intimation shall be sent to the assessee specifying the sum so payable, and such intimation shall be deemed to be a notice of

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demand issued under Section 156 and all the provisions of this Act shall apply accordingly; and

(ii) if any refund is due on the basis of such return, it shall be granted to the assessee and an intimation to this effect shall be sent to the assessee.

Section 143 (2)

Where a return has been furnished under Section 139, or in response to a notice under sub-section (1) of Section 142, the Assessing Officer shall,

(i) where he has reason to believe that any claim of loss, exemption, deduction, allowance or relief made in the return is inadmissible, serve on the assessee a notice specifying particulars of such claim of loss, exemption, deduction, allowance or relief and require him, on a date to be specified therein to produce, or cause to be produced, any evidence or particulars specified therein on on which the assessee may rely, in support of such claim:

(ii) notwithstanding anything contained in clause (i), if he considers it necessary or expedient to ensure that the assessee has not understated the income or has not computed excessive loss or has not under-paid the tax in any manner, serve on the assessee a notice requiring him, on a date to be specified therein, either to attend his office or to produce, or cause to be produced, any evidence on which the assessee may rely in support of the return:

provided that no notice under clause (ii) shall be served on the assessee after the expiry of twelve months from the end of the month in which the return is furnished.

Issue of notice where income has escaped assessment

Section 148(2)

The Assessing Officer shall, before issuing any notice under this Section, record his reasons for doing so.

Time limit for completion of assessments and re-assessments -

Section 153(2)

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No order of assessment, re-assessment or recomputation shall be made under Section 147 after the expiry of one year from the end of the financial year in which the notice under Section 148 was served.

10. Having dealt with the relevant provisions of the Income Tax Act, let met now proceed to analyse the various case laws necessary for deciding this appeal and they are as under:

i. In the judgment of the Supreme Court reported in 1997 ITR SC (Volume 225) 447 in the case of Andhra Bank Ltd. V. Commissioner of Income Tax (SC), it was held as under:

"Once it is found that the change in the method of accounting was knowingly allowed by the Income Tax Officer taking into account all the relevant facts, it is not permissible for the Income Tax Officer, or his successor, to reopen the assessment at a later point of time under Section 147(b) of the Income Tax Act unless any information comes from an extraneous source. Further, we fail to see what is the "information" available to the Income Tax Officer in this case on the basis of which he is seeking to reopen the assessments sunder clause (b) of Section 147. We find none. Indeed, this appears to be a case of mere change of opinion. The principles enunciated in Kalyanji Mavji's case (1976)102 ITR 287 cannot save the impugned action of the Income Tax Officer. "

ii. The Supreme Court, in its decision reported in (2003) 259 ITR 19 in the case of GKN Driveshafts (India) Ltd. V. Income Tax Officer and Others (SC), observed as follows:

"We see no justifiable reason to interfere with the order under challenge. However, we clarify that when a notice under Section 148 of the Income Tax Act is issued, the proper course of action for the noticee is to file a return and if he so desires, to seek reasons for issuing notices. The Assessing

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Officer is bound to furnish reasons within a reasonable time. On receipt of reasons, the noticee is entitled to file objections to issuance of notice and the Assessing Officer is bound to dispose of the same by passing a speaking order. In the instant case, as the reasons have been disclosed in these proceedings, the Assessing Officer has to dispose of the objections, if filed, by passing a speaking order, before proceeding with the assessment in respect of the abovesaid five assessment years."

iii. In yet another decision of the Supreme Court reported in (1999) 3 SCC 30 in the case of Ram Bai v. Commissioner of Income Tax, it was held as follows:(paras 6 and 7)

"6. We have already mentioned that the ITO sought sanction of the Commissioner to reopen the matter. That was by a communication dated 17.03.1973 in which the relevant part read as follows:

> "In this case, the assessee owned 16 acres 33 cents in Nacharam Village near Hyderabad. This was acquired by the Government with effect from 27.10.1964. The assessee was awarded a final compensation of Rs.2,10,361/- on 07.07.1967. The land in question is not agricultural land and has not been subjected to agricultural operations. The capital gains are chargeable to income tax. The value as on 01.01.1954 is estimated at Rs.1,000/- per acre and the total value of the entire land as on 01.01.1954 would be about Rs.16,500/-. Thus, the assessee made a net capital gain of Rs.1,93,860/-. Besides the amount of interest that accrued year to year will

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have to be included as a protective basis. The assessee has filed a return disclosing an income of Rs.3,599/- being interest on belated compensation on 17.02.1972. As this has been filed beyond the period prescribed under Section 139(4), the return has been treated as invalid and filed. I have, therefore, reason to believe that the income chargeable to tax has escaped for Assessment Year 1965-66 and that such escapement was by reason of omission or failure on the part of the assessee to make a valid return under Section 139 for Assessment Year 1965-66. I request the Commissioner to accord sanction for reopening the assessment under Section 147(a)."

7. Apart from the said communication, there is nothing on record to disclose the material on which the ITO decided to reopen the assessment. He has made an assertion in the said communication that the land in question was not subjected to agricultural operation and that he had reason to believe, the income chargeable to tax had escaped from Assessment Year 1965-66 by reason of omission or failure on the part of the assessee to make a valid return. But for such assertion, no reference has been made to any material on the basis of which he proceeded to invoke the provisions of Section 147(a) of the Act. Even the assertion as such was a bare one without any reference to the materials on the basis of which he made the said assertion."

iv. The Supreme Court, in its judgment reported in JT 2000 (9) SC 567 in the case of Comunidado of Chicalim v. Income Tax Officer, Goa & Others, held as below:

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> "We are afraid that the High Court was in error on both counts. It is trite law that when an assessee challenges a notice to reopen under Section 147 on the ground that no reasons under Section 148 had been recorded or disclosed, the Court must call for and examine the reasons, and, in fact, ordinarily, the reasons are set out by the respondents to the writ petition in their counter. The High Court also did not appreciate that if the appellant had already been served with a notice under Section 148 and had complied therewith by filing a return, it was entitled to contend that no second notice lay, and also to submit that, in any event, the second notice was barred by time."

11. On a perusal of the records produced before this Court, it is seen that for the assessment year 2000-2001, the petitioner firm filed its return of income on 13.11.2000 declaring business loss of Rs.3,60,412/- and short term capital gains of Rs.1,16,51,612/- and thus, the total income shown was Rs.1,12,91,200/- and the petitioner had paid tax of Rs.46,68,528/-. The assessment was completed under Section 143(1) of the Act on 04.01.2002 and an intimation was sent to the petitioner with an order of refund of Rs.1,45,563/- and the same was received by the petitioner firm on 18.02.2004.

12. After a series of transactions, the respondent, without assigning any reason, has issued the impugned order on 31.03.2006, re-opening the assessment, without any fresh material. As per proviso to Section 143(2) of the Act, if at all any notice, such as the impugned notice has to be issued, it should not be issued after the expiry of twelve months from the end of the month in which the return was furnished. In the case on hand, the impugned notice has been issued by the respondent nearly after the expiry of three years. Further, from the settled legal proposition as found from one of the rulings of the Supreme Court (supra), once an opinion is given in an assessment, it cannot be re-opened by any other authority except on fresh material. That apart, a notice issued under Section 148 of the Act should be a reasoned one whereas in the case before me, the impugned order has been issued without assigning any reason justifying its issuance. Also, in the absence of any new material, the Assessing Officer is not empowered to re-open an assessment irrespective of the fact whether it is made under Section 143(1) or 143(3) of the Act. As per the rulings of the Apex Court in this regard, there must

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always be a speaking order whereas the respondent has neither chosen to adduce any reason nor found any fresh material to re-open the assessment.

13. In the light of the discussion made above and in view of the Supreme Court rulings (supra) and also the relevant provisions of the Income Tax Act already dealt with, I am of the considered view that the impugned order is liable to be set aside and accordingly, it is set aside and the writ petition is allowed with no order as to costs. Consequently, connected W.P.M.P. No.13824 of 2006 is closed.

However, it is open to the respondent to proceed further in accordance with the provisions of the Act by adducing any valid reason or by any fresh material and it is made clear that this order will not preclude the respondent from doing so.

cad

Sd/-
Asst. Registrar

//true copy//

Sub Asst.Registrar

To

The Joint Commissioner of Income Tax (OSD)
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+ one cc to Mr.S.Ramachandran, Advocate Sr.No.41709.

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